The Honorable John C. Coughenour

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

OMNI INNOVATIONS, LLC, a Washington limited liability company; and JAMES S. GORDON JR. Plaintiffs, v. SMARTBARGAINS.COM, LP, a Delaware Limited Partnership; Defendant.	No. CV06-1129JCC **REPLY IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS OR TO STAY THIS LITIGATION**

I. INTRODUCTION

In the motion at bar, Defendant SMARTBARGAINS.COM, LP ("SmartBargains") moved to dismiss or stay this litigation. Plaintiffs' fail to address the arguments advanced by SmartBargains in support of its motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). SmartBargains asserts that Plaintiffs have failed to allege facts sufficient to confer standing under CAN-SPAM Act of 2003, 15 U.S.C. § 7701 et seq. ("CAN-SPAM"), because they are not an Internet access service adversely affected by emails from SmartBargains. The grounds for SmartBargains' argument are not addressed by Plaintiffs and, therefore, should be granted.

Additionally and in the alternative, the Court should enter a stay pending a final judgment in the related action before this Court, *Gordon v. Virtumundo*, NO.

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CV06-0204JCC, W.Dist.Wa (Coughenour, J.). Plaintiffs do not oppose the stay. (*See* Response, Dkt. # 14.) Accordingly, the stay should be granted. LR 7(b)(2) (providing that "If a party fails to file papers in opposition to a motion, such failure may be considered by the court as an admission that the motion has merit.")

II. ARGUMENT

A. The Court should Dismiss Plaintiffs' CAN-SPAM Claims because Plaintiffs do not have standing.

The parties agree that, in order to have standing under CAN-SPAM, Plaintiffs must be "provider(s) of Internet access service" who are "adversely affected by a violation of section 7704 (a)(1), (b), or (d) of [the Act], or a pattern or practice that violates paragraph (2), (3), (4), or (5) of section 7704 (a)." 15 U.S.C. § 7706(g)(1). However, Plaintiffs have not alleged sufficient facts to satisfy the CAN-SPAM standing requirement.

Plaintiffs seek to characterize SmartBargains' arguments as form over substance. (*See* Response at 4). In fact, the opposite is true. SmartBargains asserts that Plaintiffs do not have standing because they do not allege facts which support their allegation that they are providers of (i) Internet access service ("IAS"), or (ii) that they were adversely affected by a violation of CAN-SPAM.

The IAS standing requirement in CAN-SPAM is a barrier to filing claims under CAN-SPAM. The Act does not provide for a private right of action merely from the receipt of email or from showing friends an interesting website. Rather, CAN-SPAM provides a right of action to the FTC, state attorneys' general and providers of an IAS that is adversely affected by violative emails. Under CAN-SPAM, it is not sufficient to confer standing merely because Plaintiffs allegedly "enabled computer access for multiple users to a computer server that provides access to the Internet." (*See* First Amended Complaint (Dkt. #4) at ¶ 7.) As stated in SmartBargains' moving papers, Plaintiffs' broad allegation effectively confers standing on any anti-spam plaintiff and renders CAN-

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SPAM's standing requirement a meaningless limitation to a private right of action.

Plaintiffs misstate SmartBargains' argument as somehow making a distinction between the number of Internet servers that Plaintiffs to which the Plaintiffs provide access. In fact, SmartBargains' emphasis on the use of the article "a" when referencing the adversely affected computer server is that the allegations does not require that Plaintiffs have ownership or control over the computer server. Because Plaintiffs merely provide access to a computer server, rather than their computer server, the allegation does not satisfy the standing requirement. If the Plaintiffs do not own or control the server that enables computer access for users, then the allegedly improper emails could not have caused Plaintiffs any material adverse affect. In fact, the alleged adverse effect would be incurred by Plaintiffs' Internet service provider (e.g., GoDaddy) that manages the Internet server in question and, therefore, is required to incur the effort to increase their Internet bandwidth to accommodate the emails in question. If Plaintiffs' CAN-SPAM claims survive, then any individual that shows two friends a website is an IAS because that individual has "enabled computer access for multiple users to a computer server that provides access to the Internet."

B. Plaintiffs do not Oppose a Stay of this Litigation.

SmartBargains moved the Court stay this litigation pending resolution of a related case brought by Plaintiffs testing their theories under CAN-SPAM and the Washington Commercial Email Act. There is no case law supporting many, if not all, of Plaintiffs' novel arguments. A stay is in all parties' interests and, therefore, it is not surprising that it is unopposed by Plaintiffs. After the Court enters a final judgment in the related cases brought by Plaintiffs before this Court and other United States District Courts in this State, then there is likely to be collateral estoppel/issue preclusion effect on this case. To avoid litigating the same unsettled questions of law in separate cases, it is in the best interests of the Court and the litigants to stay the present lawsuit pending final judgment

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in *Gordon v. Virtumundo*.

III. CONCLUSION

For the foregoing reasons, this Court should dismiss Plaintiffs' CAN-SPAM claims as a matter of law for failure to assert facts sufficient to confer standing on Plaintiffs. Additionally, the Court should stay all claims brought by Plaintiffs pending a final judgment in *Gordon v. Virtumundo*.

DATED this 23rd day of February, 2007.

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